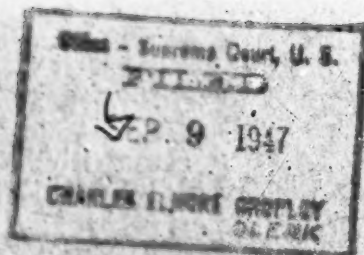


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No. 223

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., AND THE CLEVELAND UNION STOCK YARDS COMPANY, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

MEMORANDUM FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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AL., AND THE CLEVELAND UNION STOCK YARDS
COMPANY, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF OHIO, EAST-
ERN DIVISION

MEMORANDUM FOR THE UNITED STATES AND INTER-
STATE COMMERCE COMMISSION IN OPPOSITION TO
MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 7, paragraph (3), appel-
lants, the United States and Interstate Com-
merce Commission, file this statement opposing
appellee's motion to dismiss or affirm. For a
discussion of the nature and importance of the
case and of the questions presented, we respect-
fully refer the Court to our jurisdictional state-
ment. The following comments are directed to

(1)

statements contained in appellee's motion to dismiss or affirm, which was served on appellants on August 11, 1947.

After stating that the facts upon which the District Court decided this case, and its conclusions of law, "are so sound and logical in the application of elementary principles that reasonable minds can come to no other conclusion," (p. 1 of brief in support of motion) appellees, somewhat inconsistently we think, set out 14 basic issues they assert are involved in the appeal (pp. 4-7 of brief in support of motion).

We think the question before the Court is correctly set out in the Commission's report of May 3, 1946, 266 I. C. C. 55: here under review, where the Commission stated the question as follows (p. 62):

The carrier's defense presents the question of whether a railroad, by entering into a contract with the Stock Yards Company aimed at compelling shippers making livestock shipments to Swift and the other industries beyond the track of the Stock Yards Company to use the facilities of the Stock Yards Co., can abrogate obligations placed upon it, in the public interest, by the Interstate Commerce Act. * * *

While the facts are depicted at some length in the Commission's decision, for the disposition of this motion, we would like to point out the physical situation very briefly. Leading off the main

line of the New York Central into Cleveland is a spur track, the initial 132 feet of which is owned and operated by the Railroad. This 132 feet connects with a track 1,619 feet long, such track and the land over which it is built being owned by the Cleveland Union Stock Yards Company, but maintained and operated by the New York Central. This piece of track, known as Track 1619, in turn connects with another New York Central track, which runs into the plant of Swift & Company and several other packing plants, where the Railroad's track connects with the private tracks of these plants, upon which commodities are received and delivered by the Railroad. In other words, as the Commission said, Track 1619 is an "essential link" in the movement of commodities from these seven plants to the outside world. Without the use of Track 1619, there is no way for these industries to receive inbound shipments or deliver outbound shipments by rail, directly from their plants. For a number of years, the Railroad transported all classes of freight, including livestock, to and from the plant of Swift and the other industries over Track 1619. Since February 1, 1935, the railroad has transported all freight *other than livestock* to and from these plants.

Conceiving that the use of Track 1619 for the delivery of livestock was injurious to its own business, which was the operation of a stockyard

in Cleveland, the Cleveland Union Stock Yards Company forbade the use of this track by the New York Central for the delivery of livestock (although it could be used and is being used for the movement of all other commodities) except upon the payment of charges for the use thereof which the New York Central considered exorbitant. The Commission, in its report, described these charges as a "penalty", having no relation to the reasonable compensation for the use of Track 1619. The Railroad had operated over Track 1619 under an agreement originally entered into on May 10, 1899, which had been amended from time to time, until February 1, 1935, when a new agreement was made in which it was provided that Track 1619 could not be used for the delivery of livestock except upon the payment of the "penalty" charges. It was then necessary for Swift to take its livestock at certain hold pens in the stockyards, short of its siding, and drive its livestock across a public street to its yards for slaughter, for which additional charges had to be paid to the Stock Yards Company. This gave rise to the proceedings before the Commission. After a full hearing, the Commission held that the failure of the railroads to deliver livestock to the side tracks of the packing plants was an unreasonable practice in violation of Section 1 (6); that the failure of the railroads to deliver such livestock to Swift, while according

delivery to its competitors in Cleveland, constituted a violation of Section 3 (1) forbidding undue prejudice and unjust discrimination; and also held that in furnishing cars for the transportation of all traffic except livestock, and in refusing to operate over the switch connection on livestock, the New York Central was violating the provisions of Section 1 (9).

In its report, the Commission stated that the Cleveland Union Stock Yards Company was of course entitled to reasonable compensation for the use of its track but could not look to one commodity, livestock, for that compensation. It further held that the agreement which the New York Central had entered into could not excuse that carrier from obeying the commands of the Interstate Commerce Act, and, if, as the Commission held, it resulted in an abrogation of its duties under the Act, the contract must give way.

The Interstate Commerce Act recognizes that common carriers need not own all the tracks over which they operate. Section 1 (1) declares that "the provisions of this part shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad * * *". Section 1 (3) (a) provides that the term "railroad" shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches.

spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * persons or property * * *." (Italics supplied.) Section 1 (4) makes it the duty of every common carrier to provide and furnish transportation upon reasonable request therefor.

In setting aside the Commission's order, the lower court (71 F. Supp. 499) did so on what it conceived to be the "principal and vital flaw in the Commission's order," and held, as to this one point, that the only way the Commission could lawfully order the Railroad to operate over the tracks of the Stock Yards Company, would be by a transfer of property, and this could not be done short of condemnation and compensation. Although, as stated, the district court considered only this one question in its decision, subsequently, when it entered its findings of fact and conclusions of law, it set the Commission's order aside on other grounds, holding that there was no basis for findings of violations of Section 1 (6), 1 (9) or 3 (1). In so doing, appellants submit that the Court clearly substituted its judgment for that of the Commission upon administrative matters.

We submit that the issues involved in this appeal are important in the Commission's administration of the Interstate Commerce Act. As the Commission pointed out, the fact that the New York Central, acting in compliance with its

private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over its spur (livestock) does not alter the fact that the use it is making of the spur, including Track 1619, is generally for all traffic offered and all industries reached. To say that the Stock Yards, while granting the use of its Track 1619 generally to common carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by contract, nullify the laws under which the railroad operates. The Stock Yards is not withdrawing its track from public use but is contracting for its continued use as a part of the railroad's common carrier track. The Commission said, "Whatever may be the right of the Stock Yards to altogether withdraw its track from public use, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common-carrier status of the New York Central's spur No. 245 but that the latter remains, with respect to its said spur, as much subject to the act and its provisions as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places." (266 I. C. C. 55, 55).

The Commission's order was directed primarily to common carriers by railroad over which it has

complete jurisdiction, and when such carriers contract with a non-carrier, the latter must be presumed to know the limitations placed by law upon the carrier's right to contract. The reasonable compensation to which the Stock Yards is entitled for the use of its track does not mean compensation arrived at on the basis of what its earnings would be if the railroad's spur was not open to the carriers for delivery of livestock to points beyond Track 1619. Under the last arrangement entered into with the Stock Yards, the railroad is today operating the connection for every other kind of freight except livestock.

The propriety of the Commission entering its order against the Cleveland Union Stock Yards Company, the owner of Track 1619, a non-carrier, was entirely appropriate under the provisions of Section 2 of the Elkins Act, Title 49, U. S. Code, section 42, which reads:

§ 42. *Parties included in proceedings to enforce law.*—In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations,

orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers. (Feb. 19, 1903, c. 708, § 2, 32 Stat. 848; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.)

Under this provision the Stock Yards Company, like any other defendant, is bound not to defeat the order. Whatever the right of the Stock Yards to terminate the agreement altogether, and that is not involved here, the carrier cannot continue service for all other kinds of traffic and refuse transportation as to livestock. The Commission was not required to go beyond that undisputed fact at this time and project its judgment into the complete termination of transportation service, which might never occur; it had to stop an actual discrimination that was presently existing and presumably would continue.

Furthermore, the question of complete abandonment of the track might run counter to State law because Section 523 of the Ohio General Code provides that the State Commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over tracks for such railroad.

In treating the Commission's action as condemning the property of the Stock Yards without

just compensation, the District Court erred. There was no condemnation here; the Stock Yard's track had already been devoted to public use and was in fact being used by the railroad for the transportation of all kinds of in-bound and out-bound freight, except livestock. Among other things, the Commission held that the railroad could not, by agreement with the Stock Yards, while using Track 1619 as a part of its line, discriminate against a particular form of traffic, livestock, or against particular shippers, Swift and the others, on the end of the line dependent on the railroad for service.

It is respectfully submitted that the motion to dismiss or affirm should be denied and probable jurisdiction noted.

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Solicitor General.

✓ EDWARD J. HICKEY, JR.,

Special Assistant to the Attorney General.

✓ DANIEL W. KNOWLTON,

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✓ EDWARD M. REIDY,

Assistant Chief Counsel,

Interstate Commerce Commission.

SEPTEMBER 1947.